Not to Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ELMER KEITH TAYLOR, Defendant.	No. CR02-3042-MWB **ORDER REGARDING MAGISTRATE'S REPORT AND RECOMMENDATION CONCERNING DEFENDANT'S MOTION TO SUPPRESS**

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I. INTRODUCTION AND BACKGROUND

A. Procedural Background

On October 25, 2002, a six count indictment was returned against defendant Elmer Keith Taylor charging him with robbery affecting commerce, in violation of 18 U.S.C. § 1951, possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), possession of a stolen firearm, in violation of 18 U.S.C. §§ 922(j) and 924(a)(2), interstate transportation of a stolen vehicle, in violation of 18 U.S.C. § 2312, and possession of a stolen vehicle which had traveled interstate, in violation of 18 U.S.C. § 2313. On April 11, 2003, defendant Taylor filed a motion to suppress. In his motion, defendant Taylor seeks to suppress all evidence obtained following the stop of a vehicle in which he was a passenger. Defendant Taylor's motion to suppress was referred to United States Magistrate Judge Paul A. Zoss, pursuant to 28 U.S.C. § 636(b). On July 23, 2003, September 17, 2003, and October 7, 2003, evidentiary hearings were held. On October 22, 2003, Judge Zoss filed a Report and Recommendation in which he recommends that defendant Taylor's motion to suppress be granted as to any statements Taylor made to government representatives during plea negotiations, but be denied in all other respects. The government filed notice that it had no objections to Judge Zoss's Report and Recommendation on October 29, 2003.[1] Defendant Taylor has filed objections to Judge

[1]Because no party has filed an objection to that portion of Judge Zoss's Report and Recommendation regarding the suppression of any statements defendant Taylor made to government representatives during plea negotiations, and it appears to the court upon review of Judge Zoss's findings and conclusions, that there is no ground to reject or modify this portion of his report and recommendation, the court therefore accepts this portion of Judge

(continued…)

Zoss's Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Taylor's motion to suppress.

B. Factual Background

In his Report and Recommendation, Judge Zoss made the following findings of fact:

> A convenience store near Interstate 35 in Hanlontown, Iowa, was robbed at about 4:00 p.m. on September 17, 2002. The store clerk called "911," and described the robber as a tall black male, 45 to 50 years old, wearing glasses, armed with a big gun; and driving a newer-style, tan, two-door Chevrolet Blazer, with out-of-state license plates. According to the clerk, the get-away vehicle headed north on Interstate 35. Worth County, Iowa, Deputy James Boyden was dispatched from the Worth County Sheriff's office to respond to the call. As he was traveling toward Interstate 35, Deputy Boyden heard over the radio that the robber was accompanied by a woman wearing a white T-shirt.
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> A short time later, Deputy Boyden observed a vehicle generally matching the description of the get-away vehicle coming out of the Iowa Welcome Center near an exit off of Interstate 35, a short distance north of the convenience store. He saw one occupant in the vehicle, a woman in a white T-shirt. She looked at the deputy with what he described as a "deer-in-the-headlights" look, and turned her vehicle onto a local road without using a turn signal. Deputy Boyden decided to stop the vehicle. He followed the vehicle for a short distance, and then activated his red emergency lights. The vehicle slowed briefly, and then sped up. Deputy Boyden activated his siren, and the woman pulled the vehicle over to the side of the road.
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> Deputy Boyden ordered the woman out of the vehicle,

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[1](…continued)
Zoss's Report and Recommendation.

and she complied. Deputy Boyden then saw a black male (later identified as Taylor) in the back seat of the vehicle. Deputy Boyden drew his gun and ordered Taylor out of the vehicle and onto the ground. Taylor got out of the vehicle, but he refused to get on the ground. Instead, he re-entered the vehicle on the driver's side and got behind the wheel, while the woman got into the vehicle on the passenger's side. Taylor drove away. Deputy Boyden thought he saw Taylor reach under his seat, and fearing Taylor was reaching for a gun, Deputy Boyden fired several shots at the vehicle, striking the left front tire and the driver's-side door. Deputy Boyden re-entered his police car and gave chase. After traveling about two miles, Taylor pulled the vehicle over to the side of the road, got out, and ran into a bean field. Deputy Boyden stopped his car, and ordered Taylor to come out of the field and get on the ground. When another officer arrived on the scene, Taylor complied and was taken into custody.

Taylor was transported by another officer to the Worth County Jail. When he arrived at the jail, he was left in the police car for about 30 minutes, and then was taken into the jail for processing. Jailer Jesse Luther inventoried Taylor's property, and read Taylor his *Miranda* rights. He then took Taylor to a secure room, where Taylor's handcuffs were removed. Luther gave Taylor a jail jumpsuit, which Taylor put on. Luther then asked Taylor to sign a *Miranda* advice-of-rights form and some other paperwork. Taylor refused to sign anything, so Luther wrote "refused to sign" on the paperwork.

At 11:30 p.m., Agent James Wertz met with Taylor in an interview room. Taylor asked that his female companion, "Anna," be brought into the interview room with them. Wertz arranged for Anna to be brought into the room. Agent Wertz again advised Taylor of his *Miranda* rights. Taylor stated he understood his rights and wished to speak with the officers. He signed an advice-of-rights form, and then read the form back to the officers without difficulty. Taylor then gave a statement admitting his involvement in stealing the vehicle in Wisconsin, robbing the convenience store in Iowa, and the ensuing chase. The interview lasted less than an hour.

Later that night, at about 4:00 a.m. on September 18,

2002, Taylor was interviewed by officers from the Milwaukee Police Department. After again being advised of his *Miranda* rights, Taylor gave a statement admitting his involvement in the sexual assault of an elderly woman in Milwaukee, and in stealing the vehicle involved in the chase from a man in the parking lot of a Wisconsin shopping center.

The court finds there is no credible evidence that Taylor was denied any rights, abused, mistreated, threatened, or coerced in any way by any representative of law enforcement at any point during this entire episode.

At some point on September 17, 2002, after Taylor's arrest, Deputy Fank applied for a search warrant to search the get-away vehicle. The warrant was issued by Magistrate Craig Ensign, and both the Magistrate and Deputy Fank signed the warrant application and related documents on September 17th, prior to the search of the vehicle. Deputy Fank filed a Return to Search Warrant in Worth County on September 19, 2002.

A Complaint was filed in federal court on September 24, 2002, charging Taylor with numerous federal crimes. Taylor was indicted on the current charges on October 25, 2002, and he initially appeared in federal court on October 30, 2002. Assistant Federal Public Defender Priscilla Forsyth was appointed by the federal court to represent Taylor on October 31, 2002.

Forsyth was aware that because of Taylor's extensive prior record, he was facing a possible "three strikes" sentence, with a mandatory sentence of life imprisonment. The prosecutor advised Forsyth that if the parties were not successful in negotiating a plea agreement, he would file a three-strikes notice. After negotiations, Forsyth agreed to present Taylor with a proposed plea agreement that would provided for Taylor to plead guilty and, subject to court approval, receive an agreed sentence of 420 months in prison. Forsyth mailed the proposed plea agreement to Taylor at the Fort Dodge Correctional Facility. Taylor read the proposed agreement, and had more than one telephone conversation with Forsyth about the terms of the agreement.

On December 19, 2002, Forsyth traveled to Fort Dodge and met with Taylor to discuss the proposed agreement. During

> their discussion, several changes were made in the proposed agreement, including changes to the only substantive area of the proposed agreement about which Taylor expressed concern during the suppression hearing. Taylor then initialed each paragraph of the plea agreement, except for the one paragraph that had been stricken; initialed each change to the plea agreement; and then signed the plea agreement. Forsyth told Taylor she was going to send the executed plea agreement to the prosecutor. The court does not give credence to Taylor's testimony that he did not understand the plea agreement, or that he told Forsyth not to "turn in" the plea agreement.
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> The next day, December 20, 2002, Forsyth mailed the executed plea agreement to the prosecutor, and arranged for Dr. Rogers to see Taylor for the purpose of presenting mitigation evidence to the judge at the sentencing hearing in the event the judge balked at the proposed agreed sentence. Dr. Rogers saw Taylor on that same day, and then communicated to Forsyth that he had questions concerning Taylor's competence. On January 3, 2003, Forsyth filed a motion asking the court to order a competency evaluation of Taylor. In the meantime, on December 27, 2002, the prosecutor signed the revised plea agreement and returned it to Forsyth, who received the fully executed agreement on December 30, 2002.

Report and Recommendation at pp. 23-27 (footnotes omitted).[2] Upon review of the record, the court adopts all of Judge Zoss's factual findings that have not been objected to by defendant Taylor.

II. LEGAL ANALYSIS

A. Standard Of Review

The standard of review to be applied by the district court to a report and

[2]The court notes that on November 6, 2003, it affirmed Judge Zoss's determination that defendant Taylor is competent to stand trial.

recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*).

As noted above, defendant Taylor has filed objections to Judge Zoss's Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Taylor's motion to suppress.

B. Objections To Findings Of Fact

1. Dr. Mrad's testimony

Defendant Taylor initially objects to Judge Zoss not including in his factual statement the factual finding that Dr. David Mrad did not rely upon the tests he gave defendant Taylor in arriving at his conclusion that Taylor was able both to understand the nature and consequences of the proceedings and to assist in his defense. Tr. at 174. Dr. Mrad testified that he administered a Validity Indicator Profile ("VIP") which is used to ascertain the validity of other psychological tests performed by defendant Taylor. Tr. at 180. Taylor's performance on the VIP was classified as "invalid" with a subcategorization of "careless." Tr. at 180. Dr. Mrad explained that Taylor was not putting forth a "sustained consistent effort" in his test taking. Tr. at 180. Dr. Mrad also testified that the

results of the validity scales on Taylor's Minnesota Multiphasic Personality Inventory ("MMPI") test were clearly indicative of someone who was exaggerating their responses to the test. Tr. at 183. As a result, the remainder of the test was rendered "virtually unusable." Tr. at 183. Dr. Mrad reported that he was unable to completely administer the Revised Competency Assessment Instrument due to defendant Taylor's resistance to answering the questions on that examination. Tr. at 186-87. Thus, Dr. Mrad did consider the results of the tests in assessing defendant Taylor's mental status. Therefore, this objection is denied.

2. Dr. Rogers's testimony

Defendant Taylor also objects to Judge Zoss not including a factual finding that Dr. Rogers testified that although defendant Taylor may understand certain words in the *Miranda* warnings, he was unable to understand the concept of waiver. Defendant Taylor also asserts that Dr. Rogers did not testify that he could not understand the plea agreement but rather that Taylor was unable to process certain portions of the plea agreement. Dr. Rogers did testify that he was of the opinion that defendant Taylor would not have been able to knowingly and intelligently waive his rights. Tr. at 245. Dr. Rogers explained that while defendant Taylor could understand the meaning of individual words, he was unable to grasp using the concepts together. Tr. at 247. Dr. Rogers similarly testified that he was of the opinion that defendant Taylor was unable to understand the waiver of rights contained in his plea agreement. Tr. 257. Dr. Rogers did not explicitly state that defendant Taylor was unable to process certain portions of the plea agreement but rather merely opined: "For the same reasons I believe it is very unlikely that he would have intelligently and knowingly been able to waive anything then." Tr. at 257. Therefore, this objection is granted in part and denied in part.

3. Ms. Forsyth's testimony

Defendant Taylor next objects to Judge Zoss not including the following factual

findings regarding the testimony of Ms. Forsyth: that defendant Taylor did not agree with the terms of the plea agreement, that Ms Forsyth had been unable to negotiate several concessions which defendant Taylor wanted; that defendant Taylor had not been happy with the plea agreement; that Ms. Forsyth did not address the waiver of rights under Federal Rule of Evidence 410 but discussed the plea in general terms.

Ms. Forsyth testified that she represented defendant Taylor from the time of his initial appearance up until defendant Taylor had signed a written plea agreement. Tr. at 441. Defendant Taylor did not wish to waive his appeal rights and Ms. Forsyth agreed with defendant Taylor that he should not sign paragraph 25 of the plea agreement. Tr. at 455. She also testified that defendant Taylor had questions about specific paragraphs in the plea agreement but that she couldn't remember all his specific questions. Tr. at 455. On cross-examination, Ms. Forsyth testified that she did not recall having a discussion with defendant Taylor regarding his waiving his rights under Federal Rule of Evidence 410, but that she explained the language that was in the plea agreement to defendant Taylor. Tr. at 467. She also testified that while Taylor was unhappy with the idea of the 35 year prison sentence called for by the plea agreement, he believed the plea agreement was preferable to a possible life sentence if he went to trial. Tr. at 473. Therefore, this objection is granted in part and denied in part.

4. Audio tape

Defendant Taylor also objects to Judge Zoss not discussing the audio tape of Deputy Boyden's radio communications, Gov't Ex. #1. Defendant Taylor asserts that the tape shows Deputy Boyden's heightened state of anxiety. Judge Zoss did note that the audio tape was admitted into evidence. Report and Recommendation at 3. Judge Zoss did not discuss the radio communications contained on the tape. The audio from Deputy Boyden is difficult to understand and Deputy Boyden does seem to be in an excited state. Therefore, this objection is granted.

5. Deputy Boyden's testimony

Defendant Taylor next objects to Judge Zoss's failure to indicate that Deputy Boyden first stated during his cross-examination that the SUV in which defendant Taylor was traveling failed to signal for a turn. Deputy Boyden testified on direct examination that the SUV in which defendant was a passenger failed to signal for a right turn. Tr. at 61. Therefore, this objection is denied.

6. Telephone call to defendant's mother

Defendant Taylor also objects to Judge Zoss not finding that police officers refused to permit him to call his mother following his arrest. Defendant Taylor testified that upon being transported to the jail, he asked to use a telephone. Tr. at 383-85. This request was refused. Tr. at 384-85. Defendant Taylor's testimony on this point is corroborated by the Daily Log of the Worth County Sheriff's Office at 1644 (Gov't Ex. 2), which contains a notation which reads: "ADV TO KEEP 10-95'S SEPARATED SO THEY CANNOT TALK, NO PHONE CALLS EITHER". Defendant Taylor also testified that he later asked Special Agent James Wertz of the Iowa Division of Criminal Investigations to make a telephone call but that Special Agent Wertz refused that request. Tr. at 399. Jesse Earl Luther, one of the Worth County jailers who booked Taylor into the Worth County Jail testified that he could not recall whether defendant Taylor asked to use the telephone or not. Tr. at 320. Special Agent Wertz testified that he does not recall defendant Taylor ever requesting to use the telephone. Tr. at 476. Given the uncontradicted notation in the sheriff's log instructing officers not to permit defendant Taylor to make a telephone call, the court finds that defendant Taylor did make a request to use the telephone following his arrest and that request was refused. Therefore, this objection is sustained.

C. Objections To Conclusions Of Law

1. The plea agreement

Defendant Taylor initially objects to Judge Zoss's legal conclusion that the factual stipulations in Taylor's plea agreement are admissible at trial. Defendant Taylor argues that he was not competent to enter into the plea agreement or to understand that the factual stipulations in the plea agreement could be used against him in court, and therefore, that the factual stipulations in the plea agreement are inadmissible. Factual stipulations in connection with a plea agreement ordinarily are admissible at trial, even when the defendant does not follow through and plead guilty pursuant to the plea agreement. *United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000).

Taylor further claims his waiver of rights was not competent and intelligent because his attorney did not properly explain to him the terms of the plea agreement or the rights he was giving up by entering into the plea agreement. In such a situation, the court must satisfy itself that the defendant waived his rights competently and intelligently. *Godinez v. Moran*, 509 U.S. 389, 400-402 (1993); *Faretta v. California*, 422 U.S. 806, 835 (1975) (the record must establish the defendant "knows what he is doing and his choice is made with his eyes open."). Here, the court concludes that the record evidence supports a conclusion that Taylor entered into the plea agreement knowingly and intelligently, unencumbered by a mental defect or any failure of his counsel to explain the agreement fully. The standard for competence is whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and has "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). From the testimony of Dr. Mrad, Ms. Forsyth, and, defendant Taylor himself, the court concludes that when defendant Taylor initialed and signed the plea agreement, he was able to understand the terms and effects of the plea agreement.[3] While defendant

[3]As Judge Zoss cogently pointed out in his Report and Recommendation:

(continued…)

Taylor directs the court's attention to the testimony of Dr. Rogers that defendant Taylor lacked the mental ability to understand and waive any important right, the conclusions reached by Dr. Rogers cannot be reconciled with defendant Taylor's actions during the competency/suppression hearing held on September 17, 2003, at which defendant Taylor interjected his concerns that he had not been given proper notice of the hearing and that his counsel had not engaged in sufficiently vigorous cross-examination of government witnesses at a previous evidentiary hearing. Defendant Taylor requested that he be provided with a transcript of the prior hearing and then be permitted to recall those government witnesses for further cross-examination. This request provided significant corroborative anecdotal evidence that defendant Taylor understood the terms and conditions of the plea agreement at the time that he signed it. Thus, the court finds that when defendant Taylor signed the plea agreement, he knew he was stipulating to certain facts relating to the charges against him, and he knew the stipulation could be used against him if he later decided to back out of the plea agreement. Therefore, this objection is denied.

2. Probable cause to stop the defendant's vehicle

Defendant Taylor also challenges Judge Zoss's conclusion that Deputy Boyden

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[3](…continued)

> During his testimony, Taylor demonstrated that he could understand and participate in a detailed discussion of the facts and issues in his case. He had a detailed understanding of what the plea agreement was, and of the issues presented by his entering into the plea agreement. When he acted as if he did not understand what was in the plea agreement or what certain words meant, the court found him not to be credible. As an example, during his testimony, Taylor correctly used the word "cavalier," and then when he realized what he had said, immediately stated he did not know what the word meant, and he sometimes uses words without knowing their meanings.

Report and Recommendation at 30 n.24.

observed the SUV in which defendant Taylor was riding fail to signal a turn. Defendant Taylor argues that Deputy Boyden's testimony lacked credibility. This argument is apparently centered on the false premise that Deputy Boyden did not mention the failure of the SUV to signal until his cross-examination. As the court noted above, however, Deputy Boyden testified about the SUV's failure to signal during his direct testimony. There is nothing in the record which would cause the court to reject this portion of Deputy Boyden's testimony. Police officers may stop a vehicle for any traffic violation, however minor. *See United States v. Brown*, 345 F.3d 574, 578 (8th Cir. 2003) (speeding); *United States v. Linkous*, 285 F.3d 716, 719 (8th Cir. 2002) (following too close); *United States v. Edmister*, 208 F.3d 693, 694 (8th Cir. 2000) (weaving within its own lane and having license plate illuminator that was burned out), *cert. denied*, 531 U.S. 1179 (2001); *United States. v. Perez*, 200 F.3d 576, 579 (8th Cir. 2000) (following too close); *United States v. Beatty*, 170 F.3d 811, 813 (8th Cir. 1999) (no working light illuminating license plate); *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998) (following too close). Thus, Deputy Boyden could have lawfully stopped the SUV for failing to signal a turn. Therefore, this objection is denied.

3. Defendant's statements following his arrest

Taylor seeks to suppress all statements he made to law enforcement on the evening of his arrest, arguing he lacked "the mental ability to fully understand the application of his rights." Judge Zoss found that Taylor was not mistreated or coerced in any manner, and his statements were made with full knowledge of his rights. Defendant Taylor objects to this conclusion. Defendant Taylor claims that his inculpatory statements were not voluntary, intelligent, and knowing because of his limited mental abilities, and so his constitutional rights would be violated if his statements were admitted into evidence at his trial. Where the allegation of involuntariness relies on the mental condition of the defendant, "coercive police activity is a necessary predicate to the finding that a confession

is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (holding suppression was properly denied notwithstanding testimony of a psychiatrist that defendant was schizophrenic and in a psychotic state at least the day before he confessed). As examples of coercive police activity, defendant Taylor points to the denial of his request to make a telephone call, the fact that he was held for an hour in a police squad car before being processed and that the jail cells were deemed by defendant Taylor to be cool in temperature. The government has the burden of establishing the admissibility of a defendant's pretrial statements by a preponderance of the evidence. *See Connelly*, 479 U.S. at 169-70; *United States v. Astello*, 241 F.3d 965, 966 (8th Cir.), *cert. denied*, 533 U.S. 962 (2001).

Here, the government has shown that defendant Taylor was advised of--and waived--his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) prior to questioning. The court concludes that defendant Taylor possesses the mental abilities to understand his rights and to waive those rights. The record in no way suggests that law enforcement officers exerted any improper influence over defendant Taylor. No credible evidence indicated that any officer intimidated, deceived, or coerced defendant Taylor into making any statements.[4] *See Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."). The court notes that defendant Taylor is an adult who has significant experience with the criminal justice system and nothing in the record suggests that he was under the influence of alcohol or narcotics when he waived his rights. *See United States v.*

[4]While the court has found that defendant Taylor was not permitted to make a telephone call, the court fails to see how this created a coercive atmosphere given that defendant Taylor did not ask to speak to an attorney nor did he invoke his right to remain silent.

Becker, 333 F.3d 858, 861 (8th Cir. 2003) (identifying factors relevant to voluntariness). The government has, therefore, satisfied its burden of showing that defendant Taylor's statements manifested a voluntary, knowing, and intelligent waiver of his right to remain silent. Thus, the court finds that based upon the totality of the circumstances, defendant Taylor's will was not overborne at the time he made his statements. Accordingly, this objection is also denied.

III. CONCLUSION

The court, upon a *de novo* review of the record, the court accepts Judge Zoss's Report and Recommendation and **denies in part and accepts in part** defendant Taylor's Motion To Suppress. Defendant Taylor's Motion To Suppress is granted as to any statements he may have made to the government's representatives during plea negotiations but is denied on all other grounds.

IT IS SO ORDERED.

DATED this 6th day of January, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA